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Nos. 04-1034 and 04-1384

In the Supreme Court of the United States

JOHN A. RAPANOS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

JUNE CARABELL, ET AL., *Petitioners*

v.

U. S. ARMY CORPS OF ENGINEERS, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR WESTERN COALITION OF ARID STATES ("WESTCAS") AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Do tributaries within the jurisdiction of the Clean Water Act extend so far upstream that they include large areas of dry land?

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CONSENT OF THE PARTIES

Having obtained the consent of all parties, whose letters have been filed with the Clerk, the Western Coalition of Arid States respectfully submits this Brief as Amicus Curiae supporting reversal of the judgments below.[1]

INTEREST OF THE AMICUS

The Western Coalition of Arid States ("WESTCAS") represents its members on water and wastewater issues relevant to the arid West. Its members include more than one hundred water and wastewater utilities in Arizona, California, Colorado, Nevada, New Mexico, Oregon, and Texas. WESTCAS members operate storm sewers and other municipal facilities that discharge into desert washes, drainage ditches, concrete-lined flood-control channels, and other areas that normally are dry, or at most carry a trickle of runoff from overzealously watered lawns.

These dry channels are invariably characterized as "waters of the United States" by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of

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[1] No counsel for any party authored any part of this brief and no one other than Amicus Curiae made any monetary contribution to the preparation and submission of this brief.

Engineers ("Corps"). Dry channels thereby become regulated under the Clean Water Act. Despite their dryness, these "waters" take on the regulatory classifications of actual bodies of water downstream, and become classified for fishing, swimming, and other uses such as drinking-water supply. These classifications, and the criteria established to protect them, are known as "water-quality standards". WESTCAS members are issued federal permits prohibiting the discharge of any substance in concentrations that might interfere with fishing or swimming in the dry channel, or otherwise cause the channel to exceed applicable water-quality standards. In this way, federal and state agencies declare that dry channels of the arid West must be protected for fishing and swimming, and exercise their authority to impose and enforce Clean Water Act requirements intended for wet waters.

Worse, discharges into dry channels are more heavily regulated than most discharges into wet waters. Regulators do not need to impose special requirements on most discharges into wet waters, where the discharge is diluted and quickly assimilated without causing violations of water-quality standards. Because dry channels lack water for dilution, regulators may impose special requirements to ensure that the dry channel does not exceed its water-quality standards, and that the classified uses are fully protected.

It does no good to point out that fish cannot live on dry land, or that swimmers cannot swim without water. Because the dry channel automatically receives the classification of a wet water downstream, the classified uses must be protected until the dry channel is reclassified. Why not simply reclassify? Alas, reclassification is extremely difficult at best, and often impossible.

As a result, EPA and state agencies using delegated federal authority are beginning to impose stringent requirements to protect swimming and fishing in places where these activities are constrained by the lack of water. These requirements will impose unnecessary and unreasonable costs on those who pay for municipal stormwater and wastewater treatment—the public.

Much of the problem can be solved simply by limiting the Clean Water Act's protection of fishing and swimming to channels fit for fishing and swimming—that is, to actually navigable waters and wet tributaries inseparably bound up with them.

SUMMARY OF THE ARGUMENT:

"TRIBUTARY" SHOULD NOT BE DEFINED SO BROADLY THAT IT INCLUDES VIRTUALLY ALL DRY LAND

WESTCAS submits this brief to make three simple points about tributaries, which may come within the jurisdiction of the Clean Water Act as extensions of "navigable waters" or "waters of the United States". (*See* Clean Water Act §§ 502(12), 502(7), 33 U.S.C. §§ 1362(12), 1362(7) (defining "discharge of a pollutant" as addition of pollutant to navigable waters, and "navigable waters" as waters of the United States).)

First, several courts of appeals have abused the tributary concept by defining the word to include large expanses of dry land. The Sixth Circuit held that Clean Water Act jurisdiction "can be satisfied by the presence of a hydrological connection", which can be established by artificial "tributaries" such as roadside ditches and drains. (*United States v. Rapanos*, 376 F.3d 629, 639, 642-43 (6th Cir. 2004) ("*Rapanos II*"); *accord Carabell v. United States*, 391 F.3d 704, 708 (6th Cir. 2004).) The Ninth and Fourth Circuits agree. (*Headwaters v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation canal); *United States v. Deaton*, 332 F.3d 698, 708-712 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (roadside ditch); *see also United*

States v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997), *cert. denied*, 522 U.S. 899 (man-made ditches and canals); *Quivira Mining Co. v. United States*, 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986) (gullies and arroyos).) The "hydrological connection" need not be an actual hydrological connection in which water is flowing at the time of the discharge; instead, the connection is established even if water flows only intermittently or seasonally, or only during significant or intense rainfall. (*Headwaters* at 534 (intermittent); *Rapanos II* at 643 (seasonal); *Eidson* at 1342 (significant rainfall); *Quivira* at 130 (intense rainfall).) None of these cases limits how far inland a tributary extends.

These cases go too far. By defining "tributary" to include artificial channels, they extend the concept not only to roadside ditches and irrigation canals but arguably also to urban gutters, concreted storm drains, and even underground storm sewers. By defining "tributary" to include intermittent hydrological connections, these cases extend "waters of the United States" to cover virtually all dry land, because with few exceptions rain falls on land and then flows downhill, eventually reaching a navigable water and thereby establishing an intermittent hydrological connection. Yet surely Congress did not intend the Clean Water Act to apply to Western deserts, mountain peaks, urban streets, and all the

otherwise dry land where rain falls and runs off. Dry land is not a *water* of the United States.

These concerns are not merely hypothetical. Federal agencies routinely classify dry land in the arid West as waters within the jurisdiction of the Clean Water Act. For example, the Corps of Engineers takes the position that all natural drainage features, including dry desert washes and dry eroded cuts high up on a mountain ridge, are waters of the United States so long as the dry land includes any perceptible mark left by flowing water. (*See* 33 CFR §§ 328.4, 328.3(e).)

Second, this Court has effectively excluded dry land from the scope of regulated waters in its previous wetland cases, which explain that wetlands within the jurisdiction of the Clean Water Act have a "significant nexus" with navigable waters, and are "inseparably bound up" with them. (*Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159, 167 (2001) ("*SWANCC*"), citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 1985).) The Sixth Circuit, however, has not respected the word "significant" in the phrase "significant nexus". Instead, it has asserted that any nexus—any hydrological connection—is sufficient. (*Rapanos II*, 376 F.3d at 639 ("What is required for CWA jurisdiction . . . is a 'significant nexus . . .' . . . , which can be satisfied by the presence of a hydrological connection").) The Fifth Circuit, in comparison,

has properly held that dry land and intermittent creeks are not waters of the United States. (*Rice v. Harken Exploration Company*, 250 F.3d 264, 270-271 (5th Cir. 2001); *see In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (no jurisdiction over "puddles, sewers, roadside ditches and the like").) Tributary waters should be treated as within the jurisdiction of the Clean Water Act only when they are so "inseparably bound up" that a discharge into the tributary will produce imminent, actual, identifiable, and significant contamination in a navigable water. (*See Rice* at 272.)

Third, the decisions improperly extending Clean Water Act jurisdiction to tributaries rest on the mistaken notion that jurisdiction must be extended to protect the truly navigable waters. In the words of the Fourth Circuit, a discharge into a tributary has "the potential to move downstream and degrade the quality of the navigable waters". (*Deaton*, 332 F.3d at 707.) But anything deposited almost anywhere on dry land has the potential to be washed into navigable waters. Rain undoubtedly washes into navigable waters some droppings of bears in the woods, cows in the fields, and dogs on city streets, but Congress could hardly have intended "navigable waters" to include every wood, field, and street. The Clean Water Act simply does not regulate discharges with nothing more than the *potential* to

be carried into navigable waters. It regulates only actual discharges into navigable waters.

And that is enough. When point-source discharges into tributaries flow far enough to reach a navigable water, they are regulated directly as discharges into navigable waters. (*See e.g. Needham*, 354 F.3d at 346 (proper inquiry is whether farthest traverse of spill reached navigable or adjacent waters); *Eidson*, 108 F.3d at 1340 (discharge flowing through storm drain treated as discharge to navigable water).) Discharges eventually carried to navigable water by stormwater runoff are regulated indirectly through the permitting of stormwater discharges. (*See* Clean Water Act § 402(p), 33 U.S.C. § 1342(p).) Both are also within the jurisdiction of state and local governments, which regulate the discharge of wastes into water and the dumping of wastes onto the ground. Therefore, navigable waters can be protected without categorizing dry land as waters of the United States.

For these reasons, the decisions of the Sixth Circuit in the *Rapanos II* and *Carabell* cases should be reversed.

ARGUMENT

I. Courts And Federal Agencies Have Defined "Tributary" To Include Dry Land

Corps regulations define "waters of the United States" to include wetlands adjacent to tributaries of navigable waters. (*Carabell*, 391 F.3d at 708, *citing* 33 C.F.R. § 328.1(a).) Here the wetlands at issue in both *Rapanos II* and *Carabell* were determined to be within the jurisdiction of the Clean Water Act because they were adjacent to non-navigable tributaries. (*Id.*; *Rapanos II* at 641-642.) The proper definition of "tributary" is therefore an issue fairly subsumed within the questions presented by petitioners.

When determining which tributaries are within the jurisdiction of the Clean Water Act, the Sixth Circuit has used expansive language. It has held that jurisdiction extends to "any branch of a tributary system that eventually flows into a navigable body of water". (*Rapanos II*, 376 F.3d at 639, *citing United States v. Rapanos*, 339 F.3d 447, 452-53 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) ("*Rapanos I*").) In *Carabell*, it quoted the Fourth Circuit's conclusion that the Corps could properly determine that the agency had jurisdiction "over the whole tributary system of any navigable waterway". (*Carabell* at 710, quoting *Rapanos I* at 452, quoting *Deaton*, 332 F.3d at 712.) Because the Fourth Circuit rejected the argument that tributary

jurisdiction ends at the "headwaters" of a tributary, where there is a minimum flow, these cases can fairly be read as extending jurisdiction to dry land. (*See Deaton* at 710.)

In addition to the Fourth and Sixth Circuits, the Ninth Circuit has given the word "tributary" an expansive interpretation, as has the Tenth and Eleventh Circuits in cases decided before *SWANCC*. For these courts, a tributary does not need to be a natural body of water, but can instead be an artificial construct such as a drain or roadside ditch. (*Rapanos II* at 642-43; *Rapanos I* at 453; *Carabell* at 708; *Deaton* at 708-12; *Headwaters*, 243 F.3d at 533 (9th Cir., irrigation canal); *Eidson*, 108 F.3d at 1342 (11th Cir., man-made ditches and canals); *Quivira*, 765 F.2d at 130 (10th Cir., gullies and arroyos).) The "hydrological connection" need not be an actual hydrological connection in which water is flowing at the time of the discharge; instead, the connection is established even if water flows only intermittently or seasonally, or only during significant or intense rainfall. (*Headwaters* at 534 (intermittent); *Rapanos II* at 643 (seasonal); *Eidson* at 1342 (significant rainfall); *Quivira* at 130 (intense rainfall).) In the 10th Circuit, the hydrological connection can be *underground*, and so slow that the travel time is "a lengthy period, perhaps centuries". (*Quivera* at 129-30.)

These definitions confuse a tributary with a drainage basin (also called a "watershed"). According to the U.S. Geological Survey, which monitors streamflows in the United States, a tributary is "a smaller river or stream that flows into a larger river or stream." (Water Science Glossary of Terms, http://ga.water.usgs.gov/edu/dictionary.html.) A drainage basin is the "land area where precipitation runs off into streams, rivers, lakes, and reservoirs." (*Id.*) The Mississippi River drainage basin, for example, extends from the Rockies to the Appalachians, covers more than a million square miles, and drains 41 percent of the 48 contiguous states. (Corps, The Mississippi River and Tributaries Project, http://www.mvn.usace.army.mil/pao/bro/misstrib.htm.) The Potomac River basin, although much smaller, stretches across parts of four states and drains more than 14,000 square miles. (Interstate Commission on the Potomac River Basin, Basin Facts, http://www.potomacriver.org/about_potomac/basin-facts.htm.)

When cases such as *Eidson* and *Quivira* define "tributary" by a wet connection with a navigable river during times of substantial rain, they include the entire drainage basin. The necessary hydrological connection is formed whenever rain falls anywhere in a drainage basin and flows to the navigable river draining the basin. Because almost all the land in the United States is drained by a navigable river, these

cases would define almost all the land in the United States as a "water of the United States".

And not just the land. If these cases mean what they say, the roof of the Supreme Court Building is a water of the United States, because the roof maintains an intermittent hydrological connection with navigable waters. Rain falling on the roof undoubtedly flows to a drain, down the drain to the sewers of Washington DC, through the sewers to the Anacostia or Potomac River, and down the river to Chesapeake Bay and the Atlantic Ocean.

The Corps recognizes that a tributary must be less than the entire drainage basin, but still defines the word to include dry land. According to the Corps, "The upstream limit of waters of the United States is the point where the [ordinary high water mark] is no longer perceptible". (65 Fed.Reg. 12818, 12823; *accord* 33 CFR § 328.4.) The phrase "ordinary high water mark" means "that line on the shore established by the fluctuations of water". (33 CFR § 328.3(e).) Unfortunately, the Corps interprets this definition to mean only that a mark must be present, and brushes aside comments suggesting that water must ordinarily be present. (65 Fed.Reg. at 12823.) In the arid West, marks left by flowing water are quite common, because they are not obscured by vegetation. They are particularly evident in deserts, where drainage patterns can be

seen over large barren areas. Marks left by flowing water extend to the very tops of mountain ridges. The drier the landscape, the more likely one is to find upland "waters of the United States".

According to the Corps, its jurisdiction reaches beyond natural channels to drainage ditches that "extend the [ordinary high water mark] of an existing water of the United States" and that "connect two waters of the United States". (*Id.*) Whatever these phrases may mean—the Corps seems unsure itself—they allow the Corps to assert jurisdiction over ordinary roadside ditches. (*Deaton* at 704, 710-711.)

By extending its jurisdiction to artificial channels, the Corps raises an important issue for Western municipalities: Are storm drains waters of the United States? In the arid West, stormwater is often managed by a system of aboveground channels, which may be sophisticated concrete structures or simple ditches. If these storm drains *are* waters of the United States, then they are not point sources, and do not need NPDES permits. (*See South Florida Water Management District v. Miccosukee Tribe Of Indians*, 541 U.S. 95, 112 (2004) (no NPDES permit needed for transfer of water between two water bodies that are not "meaningfully distinct").) If the storm drains *are not* waters of the United States, they may be regulated as point sources. (*See* Clean Water Act § 402(p), 33 U.S.C. § 1342(p); 40 CFR § 122.26.)

The Corps recognizes this problem, but leaves it unresolved: "Stormwater management facilities constructed in waters of the United States may, under certain circumstances, be considered waters of the United States." (65 Fed.Reg. at 12824.) No circumstances are identified.

The Fourth and Sixth Circuits do not have the restraint of the Corps. The Fourth Circuit held that "jurisdiction extends to any branch of a tributary system that eventually flows into a navigable body of water", and adopted a dictionary definition of "tributary" that "would encompass the entire feeder system". (*Deaton* at 710-711.) Taken literally, the "entire feeder system" would include not only natural tributaries and artificial roadside ditches, but also wholly underground storm sewers and the system that feeds those sewers, including roof gutters, downspouts, and roadside gutters. With decisions like these, we should not wonder that the State of California has concluded that "a Municipal Separate Storm Sewer System (MS4) is always considered a Waters of the United States", and that a municipal system includes "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, man-made channels, or storm drains". (California Regional Water Quality Control Board, San Diego Region, Order No. 2001-01, NPDES No. CAS0108758, Waste Discharge

Requirements For Discharges Of Urban Runoff From The Municipal Separate Storm Sewer Systems (MS4s) Draining The Watersheds Of The County Of San Diego, The Incorporated Cities Of San Diego County, And The San Diego Unified Port District, at D-4, D-8 (February 21, 2001) http://www.waterboards.ca.gov/sandiego/programs/stormwater/sd%20permit/Order%20No.%202001-01%20Final%20with%20attachmentss.pdf.) Despite this characterization of municipal storm-sewer systems as waters of the United States, California regulates them as point sources. (*Id.*)

The classification of dry channels and municipal storm drains as waters of the United States threatens municipalities with exorbitant costs that will produce little or no environmental benefit. Because stormwater is not centrally collected and treated like sanitary wastewater, municipalities have only limited control over stormwater quality. Ensuring that dry channels comply with water-quality standards may be impossible at any cost. And what will be gained from all this regulation and expense? Even if municipalities discharged Perrier water instead of stormwater, the dry channels would return to their dry condition soon after the rain ended, and would remain unfit for swimming and fishing because of the lack of water.

In summary, the definition of "tributary" has improperly been extended to include all the land extending from a navigable river to the tops of the mountain ridges at the edges of its drainage basin, and to artificial structures including urban streets and gutters.

II. Tributary Jurisdiction Should Be Limited To Waters Inseparably Bound Up With Navigable Waters

The problems caused by an overexpansive definition of "tributary" can be solved by applying the concepts of *SWANCC* and limiting tributary jurisdiction to those waters that have a "significant nexus" and are "inseparably bound up" with navigable waters. (*See SWANCC* at 167.) Unfortunately, in extending tributary jurisdiction to any hydrological connection, the Fourth and Sixth Circuits have changed the standard from "significant nexus" to any nexus. (*See Deaton* at 710-711; *Rapanos II* at 639 ("a 'significant nexus . . .' . . . can be satisfied by the presence of a hydrological connection".)

The Fifth Circuit, however, has properly interpreted the concepts established in *SWANCC*. It has concluded that jurisdiction "is not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters", and that "the United States may not simply impose

regulations over puddles, sewers, roadside ditches and the like". (*Needham*, 354 F.3d at 345; *see Needham* at 344 (jurisdiction under Oil Pollution Act same as Clean Water Act).) Jurisdiction should not be extended to regulate discharges "that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" (*Rice*, 250 F.3d at 272.) Discharges are subject to regulation only if there is a "close, direct, and proximate link" between the discharges and "resulting actual, identifiable . . . contamination of a particular body of natural surface water" that satisfies jurisdictional requirements. (*Id.*)

This Court should adopt the Fifth Circuit's application of the *SWANCC* standard, and hold that tributary waters are within the jurisdiction of the Clean Water Act only when they are so inseparably bound up with a truly navigable water that a discharge into the tributary will produce imminent, actual, identifiable, and significant contamination in the navigable water.

III. The Overextended Definition of "Tributary" Is Not Needed To Protect Navigable Waters

Natural water is never pure H_2O. Even normal rainwater has an acidic pH of 5.5, rather than a neutral pH of 7.0, because carbon dioxide dissolves into the rain as it falls and forms carbonic acid. (*See* http://www.epa.gov/acidrain/.) As

water runs over and through the land, it dissolves some of what it comes into contact with, and washes some into navigable waters. In agricultural areas, cow droppings may fall directly into navigable waters, or be carried in by stormwater. (*See Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1093, 1098-1099 (1998), *cert. denied*, 528 U.S. 964 (1999).) No doubt bison droppings also fell directly into navigable waters, and were carried in by stormwater, when millions of bison roamed the Great Plains. Because rain falls almost everywhere, and runs off the land into navigable waters, almost anything exposed to rain has some potential for affecting water quality in navigable waters.

The courts of appeal are therefore wrong when they suggest that the potential to affect navigable waters defines a tributary. (*See e.g. Deaton* at 707 ("Any pollutant or fill material that degrades water quality in a tributary has the potential to move downstream and degrade the quality of the navigable waters themselves"); *Rapanos I* at 451; *Rapanos II* at 639-640; *Headwaters* at 534 ("as long as the tributary would flow into the navigable body . . ., it is capable of spreading environmental damage and is thus a 'water of the United States' under the Act"), quoting *Eidson* at 1342.) Nowhere does the Clean Water Act imply that "waters of the United States" are to be determined by these standards of

"potential to move downstream" and "capable of spreading environmental damage". If these were truly the standards to be applied, they would make Corps regulations meaningless, because surely fill material placed on the bank of a navigable water has more potential to move into the navigable water and spread environmental damage than the same fill placed in a wetland miles away and connected to the navigable water only through a series of roadside ditches and drains.

The Sixth Circuit reads too much into the statement in the Legislative History that "Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." (*Rapanos I* at 451.) Regardless of how water moves, Congress explicitly limited the reach of the Clean Water Act to "point" sources, and imposed only general planning requirements on nonpoint sources. (Clean Water Act §§ 301(a), 502(12), 33 U.S.C. §§ 1311(a), 1362(12) (prohibiting point-source discharges into navigable waters), §§ 208(b)(2)(F), (K), 33 U.S.C. §§ 1288(b)(2)(F), (K) (planning process to consider control of "agriculturally and silviculturally related nonpoint sources of pollution" and "the disposal of pollutants on land").) Congress therefore excluded many sources, and many waters, from regulation under the Clean Water Act.

The courts of appeal are also wrong to the extent that they suggest that discharges to non-navigable waters cannot

be regulated under the Clean Water Act, even if they pollute navigable waters. Discharges that reach navigable waters by way of non-navigable waters and artificial conveyances such as pipelines are routinely treated as discharges to navigable waters. In *Needham*, for example, the Fifth Circuit held that the proper inquiry in determining whether an oil spill violated the Oil Pollution Act was not where the oil was initially deposited, but whether it reached navigable waters or jurisdictional adjacent waters. (*Needham* at 346; *but cf. Rice* at 272 (generalized assertion that covered surface waters will eventually be affected insufficient).) In *Eidson*, the defendant discharged material to a storm sewer, and the material apparently flowed through the sewer to a ditch. (*Eidson* at 1340.) In upholding the conviction, the Eleventh Circuit never stopped to consider whether the storm sewer was a water of the United States. It treated the discharge as a discharge to the ditch, which it found to be a navigable water. (*Id.* at 1342-1343.) In this way, point-source discharges that reach navigable waters are routinely subject to Clean Water Act requirements.

Discharges that reach navigable waters indirectly, when they are carried downstream by rain, are regulated as stormwater discharges. (*See* Clean Water Act § 402(p), 33 U.S.C. § 1342(p); 40 CFR § 122.26.) They are also regulated by state and local governments. (*See e.g.* California Water

Code § 13050(e) (defining "waters of the state" to include all surface water and groundwater), § 13260 (requiring report of waste discharges that could affect waters of state), § 13263 (authorizing state agency to issue waste-discharge requirements), § 13264 (prohibiting discharge of waste before filing report with state agency), §13304 (authorizing state agency to issue cleanup and abatement order for wastes deposited where they may create a condition of pollution or nuisance); Fish & Game Code § 5650 (prohibiting deposit of substances deleterious to fish where they may pass into the waters of the state).) Navigable waters can therefore be well protected without categorizing all tributaries and dry land as waters of the United States.

In summary, by misusing the concept of a tributary, several courts of appeals have defined "waters of the United States" so broadly that the phrase covers virtually all the land in the United States. Clean Water Act jurisdiction should extend only to those tributaries that are so inseparably bound up with a truly navigable water that a discharge into the tributary will produce imminent, actual, identifiable, and significant contamination in the navigable water. A more expansive definition would be inconsistent with Corps regulations and the specific provisions of the Clean Water Act.

CONCLUSION

For these reasons, the decisions of the Sixth Circuit in the *Rapanos II* and *Carabell* cases should be reversed.

Respectfully submitted,

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